

Protest of) Date: January 8, 1993
MEMOREX TELEX CORPORATION)
Solicitation No. 104230-92-A-0089) P.S. Protest No. 92-73

DECISION

Memorex Telex Corporation (Memorex) protests the terms of a solicitation for the purchase of automated cartridge tape libraries. Solicitation No. 104239-92-A-0089 was issued by the Office of Procurement, Headquarters, on August 14, 1992, seeking offers for an indefinite quantity of automated cartridge tape libraries^{1/} to be installed at the Postal Service's Postal Data Centers in New York, Minneapolis, and Raleigh.^{1/} The solicitation was the subject of five amendments, as follows:

A01, August 17, corrected the issue and due dates for the solicitation. As corrected, proposals were initially due August 28. (The protest file does not indicate the issue and due dates which the solicitation originally contained.)

A02, August 25, extended the proposal due date to September 1, made various revisions to the solicitation's technical requirements, amended the solicitation's evaluation scheme at section M, and replied to vendor questions.

A03, August 31, extended the proposal due date to September 8, made further revisions to the solicitation's requirements, further revised section M, and replied to additional vendor questions. The amendment contained the following

^{1/} The solicitation describes a tape library storage unit as having the ability to retrieve tape cartridges robotically from a tape library, mounting them on tape drives, and returning them to the library. Solicitation B.1.1. The solicitation established different minimum cartridge capacities for each of the three sites, B.1.2.3. It acknowledged "that library systems can be configured with different numbers of tape drives," and provided that if systems were offered with unused drive capacity, additional controllers and tape drives were to be proposed to fully load each system. B.1.2.5. B.1.2.4 required that the library units to be provided in addition to each PDC's minimum requirements "shall have 5,000 cartridge minimum capacity, two controllers, eight transports, and eight channel attachments each."

As part of their proposals, offerors were to demonstrate how the requested equipment would be installed in the space available for it at each of the Data Centers. Section J. 11.

^{2/} The contracting officer's statement notes that the solicitation had been preceded by the issuance of a Request for Comments (RFC) for the acquisition of tape libraries, to which both Memorex and Storage Technology Corporation (StorageTek), the eventual awardee, responded.

question^{4/} and answer:

1. "A proposal that includes even one library unit (as defined in the glossary at Attachment D of the solicitation) which contains less than 5,000 cartridges for use by the data center does not meet the mandatory requirements of the solicitation and is technically unacceptable, as per M.3."

Response: Only one library at each Data Center may have a capacity below 5,000 tape cartridges. Any library proposed with a capacity of less than 5,000 tape cartridges^{4/} must be expandable to a capacity of 5,000 or more tape cartridges.

The question and answer portion of the amendment was preceded by the following caption:

The following questions and responses are provided for clarification and in no way change the solicitation. Changes to the solicitation can only be made through an official [sic] Amendment [sic].

A04, September 3, substituted page 4a of the solicitation and changed the size of the Raleigh, NC, library complex from 12,000 cartridges to 20,000 cartridges.

A05, September 3, amended the solicitation "to include the requirement that only one Automated Tape Library at each Data Center may have a capacity below 5,000 tape cartridges." Offers were due at noon on September 8.^{4/}

^{3/} The protest file indicates that the question came from an August 26 letter from StorageTek.

^{4/} This decision refers to tape cartridge libraries of less than 5,000 cartridges as "small tape libraries."

^{5/} It appears, although the contracting officer does not so indicate, that amendment A05 was issued in response to a letter which Memorex furnished the Postal Service on September 3. The text of the letter was as follows:

The "Response to Vendor Questions" mailed along with Amendment A03 states in response to Question 1: "Only one library at each Data Center may have a capacity below 5,000 tape cartridges." This statement does not accurately reflect the solicitation, which imposes no limit on the number of libraries at each Data Center with a capacity below 5,000 tape cartridges. As stated by the Postal Service, the question and responses "in no way change the solicitation. Changes to the solicitation can only be made through an official Amendment."

Any prohibition of an offer of more than one library at a Data Center with capacities below 5,000 cartridges would be an undue and unjustified restriction. Such an offer with capacities below 5,000 cartridges may provide price or other advantages to the Postal Service. Having more than one library with capacities below 5,000 cartridges does not increase the operational workload, but even if it did, the price and other advantages to the Postal Service may more than offset any supposed increase in operational workload.

Memorex Telex will propose accordingly.

By letter received the morning of September 8, Memorex protested amendment A05 on two grounds. The first ground was that by failing to extend the date set for the receipt of offers, the amendment did not provide offerors sufficient time to consider the amendment and revise their proposals in response to it. The protest asserted that the amendment made a major change in the solicitation, requiring offerors such as Memorex, who had proposed to provide multiple small tape libraries, to engage in substantial review of the site plans and to revise their proposals to accommodate larger library units.

The second ground of the protest was that the limitation on the number of small tape libraries was unduly restrictive and lacked a rational justification. Noting that it had been told that the use of smaller tape libraries would lead to an increase in the Postal Service's "operational workload," the protester disputes that contention, noting that depending on the configuration, systems using multiple small tape libraries would require less operational workload than systems using units of larger capacity. Alternatively, the protester suggests that if operational workload per site is an issue, it should be the subject of an appropriate evaluation criterion, and that it is unjustifiable to single out tape libraries under a specific size.

The contracting officer's statement asserts that Memorex had asked for a further extension of the time for the receipt of offers on September 4 and had been told that no extension would be given "because award had to be made by September 18." The contracting officer contends that Amendment A05 required no further extension of time because only one of twenty-one prospective vendors requested an extension, the amendment was neither a major change nor unexpected (given amendment A03 and discussions between Memorex and the Postal Service on August 25 which followed amendment A03), and the amendment was "an administrative action, not a change to the solicitation." The contracting officer cites as evidence that enough time was available the fact that Memorex was able to submit a basic proposal and two alternate proposals, although she notes that the two alternate proposals were not technically acceptable.

The contracting officer contends that the requirement that the system contain no more than one small tape library excludes no offerors from the competition, and that the requirement is clearly functional. She cites the requiring activity's explanation for the requirement, which states, in part:

Small libraries would naturally be proposed with fewer tape transports. Some vendor products have no automated means of moving tapes among libraries.

These circumstances would entail constant attention by skilled data center staff to forestall concurrent request[s] for tapes in a single library from exceeding that library's total drive capacity. Computer jobs at Minneapolis, for example[,] payroll calculations, require concurrent reading of multiple tapes. The consequence would be constant human intervention to foresee tape mounting conflicts and resolve them by moving tapes among units to balance the library workload. This requirement for staff involvement in tape management negates the reason for purchasing ATs, which is cost avoidance through reduction in

staff.^{4/}]

The contracting officer's statement advises that with the concurrence of the Vice President, Purchasing, a contract was awarded to StorageTek while the protest was pending on September 18. The award was the subject of a second protest from Memorex, P.S. Protest No. 92-81, which Memorex subsequently withdrew.

StorageTek submitted comments concerning the protest which contend that amendment A05 did not make a major change to the solicitation because prior to the amendment, all libraries offered had to have a 5,000 cartridge capacity. Amendment A05 removed that limitation with respect to one library system at each installation location. StorageTek asserts that it had had adequate time to submit its proposal after the amendment, that the amendment did not exclude any potential offerors from proposing, and that in any event it is within the Postal Service's "exclusive domain" to determine the functional requirements of the systems it seeks.

The protester had responded to the contracting officer's statement, making the following points:

-- Contrary to the contracting officer's view, amendment A05 was both major and unexpected. The amendment had a significant effect on Memorex's proposal, requiring its revision over the Labor Day weekend, occupying time which otherwise might have been used to make the proposal more favorable. One of Memorex's alternate proposals was found technically unacceptable for reasons directly related to the constraints imposed by amendment A05; had more time been available, more alternatives could have been explored and the alternate proposal might have been made fully acceptable.

-- The contracting officer's view that amendment A05 worked no change to the solicitation is untenable. Prior to the amendment, the solicitation contained no limitation on the number of small tape libraries that could be offered for any site.

^{6/} Other portions of the requiring activity's justification, not quoted by the contracting officer but included in the protest file, make the following additional points:

[L]east-cost solutions should minimize the total library units at a site, since each unit must have at least one dedicated controller and drive unit, as well as separate power supplies and other electronics. It was clear that proposals with several small libraries would be less efficient than those that minimized this duplication of equipment.

The reason for Memorex Telex Corporation's request to relax the restriction . . . is the footprint of their tape library offering. The largest unit requires an area 63 feet long. . . . The Minneapolis Data Center, with restricted area available, a need to automate 23,000 cartridges, and no space for expansion, is an especially problematical environment for Memorex's library.

* * *

[A] proposal that does not minimize the number of library units within the limits of the available technology would not be technically acceptable. This is especially true at Minneapolis, where the minimum requirement is 23,000 tapes and the maximum is 38,000. The data centers have a legitimate operational requirement for solutions that will minimize the number of separate libraries.

Amendment A03 had not created such a limitation because the questions and answers were specifically indicated as not having that effect, nor could Memorex's previous conversations with technical personnel have had that effect.

-- It is incorrect to assume that the time constraint resulting from the amendment applied equally to all offerors. At least one offeror, StorageTek, apparently thought the limitation imposed by the amendment had previously been in place, but due to differences in the individual offeror's systems, may not have been affected by it.

-- Noting that only four offerors submitted proposals, the protester suggests that the affect of the amendment may have been to discourage or prevent seventeen of the twenty-one sources which the contracting officer identifies from proposing. Memorex supplies the comments of another offeror concurring in Memorex's assertions of the impact of the amendment on its proposal preparation.

-- The Postal Service's justification for its limitation on small tape libraries fails. There is no meaningful distinction between a tape library holding 4,918 or 4,996 cartridges and one holding 5,000. Further, there is no necessary relationship between a tape library's capacity and the number of its drives; if the Postal Service was concerned about an inadequate number of drives, it could specify an appropriate number. Operator intervention to avoid conflict in mounting tapes when tapes are read concurrently should not be necessary because of features of the system's software, but even without software, no problem should arise if the number of drives provided is adequate.

Memorex had a protest conference with this office and submitted further comments following the conference. Those comments elaborate on its contentions, summarized above. Concerning configuration, the protester notes that the 23,000 cartridge requirement for Minneapolis could be met with two alternative configurations, one offering five libraries of 5,000 cartridges each (a total of capacity of 25,000 cartridges), with a total of 32 drives as section 1.2.3 requires, and another offering five libraries of 4,600 cartridges each (a total capacity of 23,000 cartridges) with the same number of drives. The protester contends that both mathematics and common sense suggest that the chances of tape conflicts ("bottlenecks") are no less with the first configuration than the second.

The protester notes that its 4,600 cartridge libraries have a smaller footprint than its 5,000 cartridge libraries, and that where installation space is limited, as at Minneapolis, it was severely hampered in designing its system by the limitation imposed by amendment A05. It notes that StorageTek's units of capacities greater and lesser than 5,000 have the same footprint, so that it was not similarly affected.

Restating its contention that before amendment A05 the solicitation did not restrict library size, the protester notes that the contracting officer has not identified such a restriction. The protester rebuts StorageTex's contention that B.1.2.4 imposed such a limitation, contending that it applied only to library units in addition to the minimum quantity initially required for each data center.^{1/}

^{1/} Memorex suggests that B.1.2.4 may require that small libraries be expandable to a 5,000 cartridge

As an alternative to its rebuttal comment suggestion that Amendment A05 substantially limited competition, Memorex suggests that given the limited number of vendors of large tape library units, the perception that twenty-one sources could be seriously interested in the procurement was incorrect, and that it is appropriate to look to the impact of the amendment on the smaller number of firms which actually proposed. Noting that it and another vendor (half of the proposers) have each asserted the adverse impact of the amendment, Memorex concludes that it has demonstrated that the solicitation time should have been extended.^{1/}

Finally, the protester notes its understanding that the occasion for the haste which precluded the further extension of the time for the receipt of proposals was that the fiscal year was about to end. The protester asserts that this was not a sufficient reason, considering the Postal Service's delay in issuing a solicitation.

Discussion

To the extent that the contracting officer's position is that amendment A05 had no substantive effect on the solicitation (and thus required no additional time in which offerors could consider its effect), that position is clearly incorrect.^{1/} The sequence of events involving and following the issuance of amendment A03 demonstrates that the Postal Service concluded at some point that it wished to have no more than one small tape library at each site and said so in amendment A03. When Memorex correctly challenged the efficacy of amendment A03 to promulgate such a requirement as an answer to a vendor question given the amendment's assertion that answers could not change the solicitation, the Postal Service issued amendment A05 to accomplish its desired change.

Since the amendment changed the solicitation's requirements, it becomes necessary to resolve the issues presented by the protester, whether the Postal Service violated its obligation to allow offerors sufficient time to respond to the change, and whether the change itself is unduly restrictive of competition.

Where a protester alleges that a solicitation is unduly restrictive:

[I]t is incumbent upon the procuring agency to establish prima facie support for its contention that the restrictions it imposes are reasonably related to its needs. But once the agency establishes this support, the burden is then on the protester to show that the

capacity, but notes that such a limitation did not impact Memorex's small libraries, which can be so expanded.

^{8/} Memorex refers to Procurement Manual (PM) 4.1.2 b. and i., which provide, respectively, that solicitations must allow sufficient time for offerors to prepare and submit proposals, and that amendments "must be issued in sufficient time to permit affected offerors to consider [them] in submitting or modifying their proposals."

^{9/} StorageTek's reading of B.1.2.4 as requiring that all storage units have at least 5,000 cartridges is not persuasive, since the section refers to additional units, not to the minimum configuration units.

requirements complained of are clearly unreasonable.

Equipment Marketing Consultants Corporation, P.S. Protest No. 90-07, April 17, 1990, quoting Amray, Inc., Comp. Gen. Dec. B-208308, January 17, 1983, 83-1 CPD & 43. Once the Postal Service establishes prima facie support for the allegedly restrictive requirements, the protester must present an extremely high level of proof to show that those restrictions are clearly unreasonable. Pacific Bell, P.S. Protest No. 90-51, December 21, 1990.

"The determination of what constitutes the Postal Service's minimum needs is properly to be made by the requiring activity, and is not subject to being overturned in the absence of a clear showing that the determination lacks a reasonable basis." Crown Industries, Inc., P.S. Protest No. 82-83, January 6, 1983, citations omitted. "[I]f a specification is otherwise reasonable, the fact that one or more potential offerors may be precluded from participating in the solicitation does not render its terms restrictive if they reflect the legitimate needs of the procuring activity." International Technology Corporation, P.S. Protest No. 89-21, May 8, 1989.

Telesec Temporary Services, P.S. Protest No. 92-05, March 16, 1992.

This office will not substitute its judgment for that of the technical personnel absent "fraud, prejudice, or arbitrary and capricious action." Crown Industries, Inc., P.S. Protest No. 85-40, August 12, 1985.

Pacific Bell, supra.

Here, the contracting officer had offered a prima facie justification for the minimum size requirement. While the protester objects strenuously to the requirement, and some of its points adequately rebut some of the reasons cited for the requirement,^{1/} it has not met its burden of establishing the requirement's clear unreasonableness. The requiring activity acted within its discretion in concluding that from the standpoint of efficiency small libraries were less satisfactory than large ones, and in limiting the use of small libraries accordingly.

With respect to the failure to extend the time for the receipt of offers, the Procurement Manual requires that an amendment be issued "in sufficient time to allow affected offerors to consider it in submitting or modifying their offers." PM 4.1.2 i.2.

A recent decision of this office discussed the standard applicable to the review of this obligation:

In a previous case, we adopted the Comptroller General's standard as to the propriety of timing of an amendment to a solicitation:

^{10/} The protester correctly notes, for example, that the number of tape transports is a factor which is subject to the Postal Service's specification separate from the size of the tape libraries, so the requiring activity is incorrect in asserting that small libraries would "naturally be proposed with fewer tape transports."

The contracting activity has discharged its responsibility when it issues and dispatches an amendment in sufficient time to permit all prospective bidders to consider the information in preparing their bids. The propriety of a particular procurement generally does not depend on whether some prospective bidders, in fact, fail to receive an amendment in sufficient time to consider it in preparing their bids, but on whether the Government obtained adequate competition and reasonable prices. Space Services International Corporation, B-207888.4-.7, December 13, 1982, 82-2 CPD & 525.

Tulsa Diamond Manufacturing Corp., et al., P.S. Protest Nos. 85-18, 85-20, 85-23, June 20, 1985, quoting Swintec Corporation, et al., Comp. Gen. Decs. B-212395.2 et al., April 24, 1984, 84-1 CPD & 466.

Paragon Dynamics, Inc., P.S. Protest No. 92-58, September 10, 1992. An earlier decision, Concepts Office Furnishings, Inc., P.S. Protest No. 85-59, November 18, 1985, also concerned an offeror's claim that it had insufficient time to respond to a solicitation amendment issued six days before proposals were due. That decision noted the factors which the Comptroller General had identified as relevant in the similar context of sealed bid formal advertising:

In determining whether contracting officials acted reasonably and allowed bidders sufficient time to consider an amendment even though the officials may have refused to extend the bid opening date or extended it less than alleged to have been necessary, we have considered a number of factors. These include:

- (1) the length of time allowed for consideration of the amendment and submission of a bid, . . .
- (2) the proximity of bidders to the procuring activity, . . .
- (3) the significance and complexity of the amendment, . . .
- (4) the degree to which any requirement imposed by the amendment was a surprise to the protester, . . .
- (5) whether the protester had requested an extension prior to closing date, . . . and
- (6) whether other bidders submitted late bids or complained of insufficient time in which to consider the amendment. [Citations omitted.]

Tom Walsh & Associates, Comp. Gen. Dec. B-212750, January 17, 1984, 84-1 CPD & 78.

Applying these factors here, we note the following:

- Five days were available for the revision of proposals, albeit that some of those days fell over a holiday weekend.

- The proximity of the offerors to the procuring activity does not appear to have been a significant factor.
- The amendment was significant, in that it imposed a new requirement which affected at least some of the offerors, and it increased the complexity of Memorex's proposal.
- The amendment should not have come as a surprise to Memorex, since it did no more than restate the answer previously announced in amendment A03 of August 31. The protester understood the impact on its proposal of amendment A03 as shown by its efforts to avoid it in its letter of September 3.
- Memorex had requested an extension of the offer due date prior to the time set for the receipt of offers.
- No other offerors complained to the contracting officer of the time allowed for the receipt of offers.^{11/}

Here, Memorex was clearly an affected offeror, since the amendment required it to reconfigure its offering, and the contracting officer knew that it was affected by reason of its comments with respect to amendment A03. On the other hand, Memorex had enough time to submit an offer, although it contends that with more time it could have submitted a better offer.

In the circumstances here presented, although there certainly would have been no objection to the further extension of the time for the receipt of offers, the affected offeror, Memorex, had sufficient time to consider the amendment in submitting its offer, and the Postal Service received adequate competition and reasonable prices.

The protest is denied.

For the General Counsel:

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Contract Protests and Policies

^{11/} Memorex has identified such an offeror in the course of this protest, but from the contracting officer's standpoint in the course of the solicitation, only one offeror asserted such a burden.